



Maine Human Rights Commission

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INVESTIGATOR'S REPORT

E14-0364

July 11, 2016

Angela Cowger (Danforth)

v.

Addison Point Agency¹ (Houlton)

I. Complaint:

Complainant alleged that Respondent retaliated against her in violation of the Maine Whistleblowers' Protection Act ("WPA") by terminating her employment after she complained of illegal activity.

II. Respondent's Answer:

Respondent denied retaliation and alleged that Complainant was discharged because she refused to state whether she was willing to continue working for Respondent.

III. Jurisdictional Data:

- 1) Dates of alleged discrimination: February 25, 2014.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): July 23, 2014.
- 3) Respondent employs 143 people and is subject to the Maine Human Rights Act ("MHRA"), the WPA, as well as state and federal employment regulations.
- 4) Complainant is represented by David Webbert, Esq. Respondent is represented by Terrence Harrigan, Esq.
- 5) Investigative methods used: A thorough review of the materials submitted by the parties, interviews. This preliminary investigation is believed to be sufficient to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds" in this case.

¹ Complainant named "Addison Point Agency" as the respondent here. Respondent provided that its proper legal name was "Addison Point Specialized Services, Inc. d/b/a Addison Point Agency". As Complainant did not amend her complaint to that effect, the name used in the complaint (or "Respondent") is used here.

IV. Development of Facts:

- 1) The relevant parties, issues, documents, and facts in this case are as follows:
 - a) Complainant worked for Respondent as Program Supervisor from February 6, 2007 until February 25, 2014.
 - b) Respondent is a non-profit agency that provides behavioral health services to children and adults. The care services the agency provides are often funded by MaineCare via funded by Maine Department of Health and Human Services ("DHHS").
 - c) "Coworker" is a Program Supervisor who worked with Complainant.
 - d) "CEO" is Respondent's Chief Executive Officer and "CFO" is its Chief Financial Officer.
 - e) On February 20, 2014, a staff meeting was held during which Complainant and Coworker made reports that they believed Respondent was improperly billing DHHS for services that were not actually provided to clients.
 - f) Complainant alleged that she and Coworker discovered the improper billing while looking for progress notes during an audit of the agency. They discovered that many progress notes (which are used to bill for services rendered to clients) were missing even though Respondent had billed DHHS for the services. Complainant alleged that she and Coworker believed that Respondent was billing DHHS for supervisions (weekly meetings held by program supervisors), which are not direct-care services that can be billed for. Complainant alleged that she believed this to be fraudulent billing, that Respondent was billing MaineCare for more direct-care services than the agency as actually providing. Respondent alleged that it did not bill for supervisions, and that Complainant was made aware of this but refused to accept this fact.
 - g) Complainant alleged that when she and Coworker brought up their concerns regarding improper billing during the February 20th meeting, the Quality Control Manager and the Director for Respondent stated that the agency could in fact bill for supervision and that CFO had stated that this was acceptable. Respondent denies that Quality Control Manager made this statement, but acknowledges that Director stated that he believed the agency was allowed to bill for supervision (because he was unaware of billing practices). Coworker stated during this meeting that she had contacted DHHS about billing for supervision and was informed that this was not allowed.
 - h) On February 21, 2014, Complainant participated in a conference call with CEO and CFO to discuss issues raised at the February 20th meeting. During the call, CFO informed Complainant that Respondent did not bill for supervision, and confirmed that supervision was not billable to DHHS. Instead, CFO said, Respondent was "span billing" – lumping all units together for a period of time and that the state would not know which clients were served on which specific dates. Complainant disagreed that this was acceptable, and CEO, Complainant and CFO continued to discuss the issue.
 - i) On February 25, 2014 Complainant participated in a phone call with CEO. Complainant's employment was terminated during this call.
 - j) Complainant received no disciplinary action leading up to her discharge. Both Complainant and Respondent alleged that there were no problems with Complainant's job performance.

- k) Coworker's employment was terminated on February 24, 2014, one day prior to Complainant's discharge. Coworker had no disciplinary action leading up to her discharge. Complainant alleged that both she and Coworker were discharged for their joint reports of unlawful activity.
- 2) Complainant provided the following:
- a) Complainant was discharged due to her reports of what she believed was improper, unlawful billing.
 - b) During a 2/21 conference call, CEO never asked Complainant whether she wanted to continue working for Respondent and did not ask her to think about it over the weekend and call her back, as Respondent alleged. During that call, Complainant reiterated her concerns regarding improper billing and missing progress notes. CFO stated that he would have to look into it and get back to her. Complainant never stated to CEO or any member of management that she was unsure about whether she could continue to work for Respondent because it was a dishonest agency. Complainant valued her job and did not want to lose it.
 - c) Respondent contended that CEO called Complainant and left two messages for her on 2/24/2014, but this is false. Complainant was actually working on the morning of February 24.
 - d) During the February 25, 2014 phone call, CEO was audibly agitated and told Complainant she was upset with how the February 20 meeting had gone. During that call, CEO said "when your boss tells you to do something, you do it" and said "we've covered up your mistakes", implying that Complainant should cover for Respondent. When Complainant challenged CEO's statement that Complainant had made mistakes, CEO dropped that argument. Complainant asked why the agency had not reported a former intern's billing mistakes (which Complainant believed were fraudulent) to the state, and CEO said she did not like the accusations Complainant was making. CEO stated something to the effect of "I don't see how we can go forward." Complainant asked CEO if she was discharging her, and CEO stated that she was, and to pack her things and leave within the hour.
 - e) Complainant did not spread unsubstantiated rumors or tell coworkers that the agency was being "investigated" as opposed to audited, or that it was committing "fraud". Complainant just asked questions of management and brought forward concerns about the agency unlawfully billing for services that were not delivered. Complainant did not believe CEO and CFO when they stated that the agency was not billing for supervision because she had heard conflicting statements from others in the agency that presumably were aware of Respondent's billing practices.
- 3) Respondent provided the following:
- a) Complainant was not discharged due to her reports of unlawful activity or due to any job performance issues. Complainant was discharged because she refused to tell CEO whether she could move forward past her issues regarding the billing for supervision and continue to work for Respondent. Respondent needed to know that Complainant could focus on her work and provide the services she was supposed to. Respondent did not feel that Complainant was an asset to the agency if she could not trust the agency or decide whether she wanted to continue working there. CFO, who is the only employee responsible for billing and with any knowledge of billing, assured Complainant that the agency did not bill for supervision, but Complainant refused to believe him and move past the issue. Complainant asked the same questions over and over about billing and would not accept Respondent's answers. They were not progressing on the issue.

- b) During the conference call on February 21, 2016 CEO asked Complainant if she was willing to continue working for Respondent and she did not answer. CEO asked Complainant this because Complainant had previously stated to her that she was unsure whether she was willing to continue working for an agency that is dishonest. CEO told Complainant to think about it over the weekend (the call was on a Thursday) and to call her back and let her know the following Monday. CEO did not hear from Complainant on Monday and was unable to reach her despite two attempts.
- c) CEO called Complainant on Tuesday, February 25, 2014 and Complainant still was not willing to tell CEO that she could move past her issues and continue to work for Respondent. When CEO asked, Complainant stated that she was not sure because of conflicting statements regarding billing for supervision. CEO did tell Complainant that she was not in charge of billing and that it was not in her job description. Complainant then asked CEO three or more times "am I being terminated?" and CEO responded, yes, that if she could not move on, then she was being discharged, and to gather her things and leave within the hour.
- d) Complainant caused disruptions in the workplace by spreading unsubstantiated rumors and telling other employees that the agency was being "investigated" rather than audited. Respondent also discovered after Complainant's discharge that Complainant and Coworker were holding secret meetings during work and conducting their own investigation into the billing dispute rather than focusing on their work. Respondent would have issued Complainant progressive discipline had Respondent been aware of this at the time.

V. Analysis:

- 1) The MHRA requires the Commission to "determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S. § 4612(1)(B). The Commission interprets this standard to mean that there is at least an even chance of Complainant prevailing in a civil action.
- 1) The MHRA prohibits employers from discharging or otherwise discriminating against an employee in the terms and conditions of employment because of previous actions that are protected under the WPA. See 5 M.R.S. § 4572(1)(A). The WPA, in turn, protects an employee who "acting in good faith...reports orally or in writing to the employer or a public body what the employee has reasonable cause to believe is a violation of a law or rule adopted under the laws of this State, a political subdivision of this State or the United States." 26 M.R.S. §§ 833(1)(A).
- 2) In order to establish a prima-facie case of retaliation in violation of the WPA, Complainant must show that she engaged in activity protected by the WPA, she was the subject of an adverse employment action, and there was a causal link between the protected activity and the adverse employment action. See *DiCentes v. Michaud*, 1998 ME 227, ¶ 16, 719 A.2d 509, 514; *Bard v. Bath Iron Works*, 590 A.2d 152, 154 (Me. 1991). One method of proving the causal link is if the adverse job action happens in "close proximity" to the protected conduct. See *DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 514-515.
- 3) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in WPA protected activity. See *Wytrwal v. Saco Sch. Bd.*, 70 F.3d 165, 172 (1st Cir. 1995). Respondent must then "produce some probative evidence to demonstrate a nondiscriminatory reason for the adverse employment action." *DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 515.
- 4) If Respondent makes that showing, the Complainant must carry her overall burden of proving that "there was, in fact, a causal connection between the protected activity and the adverse employment action." *Id.*

To prevail, Complainant must show that Respondent would not have taken the adverse employment action but for her protected activity, although protected activity need not be the only reason for the decision. *See Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1268 (Me. 1979).

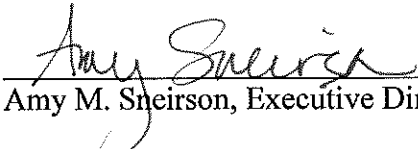
- 5) Here, Complainant establishes a prima-facie case of retaliation in violation of the WPA by showing that she reported what she had reasonable cause to believe was unlawful activity by Respondent, she was discharged, and she was discharged in close proximity to her report (within 5 days).
- 6) Respondent was unable to provide probative evidence to show that Complainant was discharged for a nondiscriminatory reason and not due to her protected activity. Reasoning is as follows:
 - a) Respondent alleged that Complainant was discharged because she refused to state that she was willing move past her allegations that the agency was unlawfully billing for supervision and continue working there. Complainant denies that she was asked whether she wanted to continue working. Even assuming Complainant was asked, it appears that Respondent conditioned Complainant's employment on whether she was willing to retract or "move past" her report of unlawful activity. It is undisputed that there were no issues with Complainant's work performance and she was not issued progressive discipline prior to her discharge. Respondent could not show a legitimate reason to discharge Complainant outside of her continued voicing of concerns regarding improper billing. Complainant was therefore able to show that, were it not for her protected activity, she would not have been discharged.
 - b) Respondent alleged that Complainant was asked if she was willing to continue her employment because it needed assurance that Complainant would be able to focus on her work and provide the services needed. Respondent produced no evidence, however, to show that Complainant's work performance had deteriorated. Respondent alleged that Complainant and Coworker held meetings at work with others to do their own investigation of the billing issue, but acknowledged that this was discovered after Complainant was discharged and therefore could not have been a factor in Complainant's discharge.
 - c) Coworker was also discharged around the same time as Complainant and similarly had no progressive discipline leading up to her discharge. The fact that both reported what they believed was unlawful activity, and were both discharged shortly after bringing forward their reports, adds further plausibility to Complainant's claim of retaliation.

7) Retaliation in violation of the WPA was found.

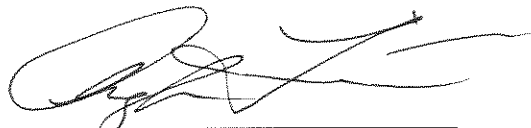
VI. Recommendation:

For the reasons stated above, it is recommended that the Commission issue the following findings:

There are **Reasonable Grounds** to believe that Respondent Addison Point Agency retaliated against Complainant Angela Cowger in violation of the WPA and MHRA by terminating her employment, and conciliation of the charge should be attempted in accordance with 5 M.R.S. § 4612(3);



Amy M. Sheirson, Executive Director



Angela Tizon, Investigator